

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER
PRODUCTS, LP; FORT JAMES
CORPORATION; and GEORGIA-PACIFIC,
LLC,

Plaintiffs,

DOCKET NO. 1:11-cv-483

vs.

NCR CORPORATION;
INTERNATIONAL PAPER COMPANY; and
WEYERHAEUSER COMPANY.

Defendants.

~~TRANSCRIPT OF MOTION TO COMPEL HEARING~~

BEFORE UNITED STATES MAGISTRATE JUDGE HUGH W. BRENNEMAN, JR.

GRAND RAPIDS, MICHIGAN

July 15, 2014

Court Reporter:

Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

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14 * * * * *

15 Grand Rapids, Michigan

16 July 15, 2014

17 9:39 a.m.

18 PROCEEDINGS

19 *THE COURT:* Good morning, gentlemen.

20 *MR. PARKER:* Good morning.

21 *MR. SIBLEY:* Good morning, Your Honor.

22 *THE COURT:* You all look familiar. It seems like
23 you were just here. The sun is trying to decide if it's coming
24 out or not. I drove a convertible to work this morning, and
25 it's one of those cases that just when you're getting on the

1 expressway when it's too late to change your mind, you start
2 seeing these drops of rain on your windshield. Well, the rule
3 of thumb is as long as you don't stop, you stay dry.

4 On the other hand, the car is not designed to
5 drive on -- it's a sports car -- it's not designed to drive in
6 the rain either. The tires aren't designed for that either.
7 So it's a tossup, you know. But, fortunately, it also can
8 outrun the rain. So I'm here safely. And having had that
9 brief thrill this morning, I can relax now and join this case.

10 We're here on the plaintiffs' motion to determine the
11 sufficiency of International Paper's answers and objections to
12 the plaintiffs' phase 2 requests to admit.

13 I've had a chance to read over the briefs. I managed
14 to get those done before the soccer match was held this
15 weekend. Not that I'm a soccer fan, but somehow I got caught
16 up in it like everybody else in America. So perhaps -- who is
17 going to be arguing on behalf of Georgia-Pacific?

18 *MR. SIBLEY:* I will, Your Honor. Trey Sibley.

19 *THE COURT:* All right. Fine. Anybody else on behalf
20 of the plaintiff or just yourself?

21 *MR. SIBLEY:* Just myself, Your Honor.

22 *THE COURT:* And who is going to be opposing the
23 motion?

24 *MR. PARKER:* I will, Your Honor. John Parker on
25 behalf of International Paper.

1 *THE COURT:* All right. Thank you.

2 *MR. PARKER:* The players are the same for you.

3 *THE COURT:* All right. Good. Counsel, please
4 proceed.

5 *MR. SIBLEY:* Thank you, Your Honor. Trey Sibley for
6 Georgia-Pacific, and may it please the Court, we're here today
7 as you note, Your Honor, on Georgia-Pacific's motion to
8 determine the sufficiency of International Paper's objections
9 to certain requests to admit and generally to resolve a dispute
10 about the relevancy and discoverability of information with
11 respect to International Paper's historical connection to
12 certain of the mills at the site.

13 Before I get too deep into that, I want to step back
14 for a second and just talk generally about the case. I know
15 Your Honor is familiar with it from the previous hearing, but I
16 think we are guilty sometimes of assuming a lot of knowledge on
17 behalf of our audience about the case, forgetting that we've
18 lived with it for many years.

19 *THE COURT:* You are right on point.

20 *MR. SIBLEY:* The case, of course, is about the PCB
21 contamination of the Kalamazoo River. And as we note in a
22 footnote in our brief, our argument 1 in phase 2 is that the
23 contamination of the river is solely the responsibility of
24 NCR Corporation. NCR developed carbonless copy paper in the
25 early 1950s, and the original formulation for that product

1 involved the use of a PCB-containing emulsion. You would coat
2 the back side of the top sheet of a multi-form -- multi-sheet
3 set of forms. That emulsion contained ink capsules, and when
4 you press on the top sheet, they would rupture and they would
5 react with clay on the bottom sheet. It's NCR's product. It
6 was a very profitable product.

7 NCR, we established in phase 1, knew very early in
8 the process that the PCB-containing emulsion that they used was
9 toxic, that it was resistant to biodegradation, and that it
10 necessarily would be discharged into environment when scraps of
11 that paper -- we sometimes call these scraps broke and trim --
12 would be recycled by deinking and recycling mills around the
13 country.

14 Indeed, the recycling of the scraps which are
15 generated when you coat the rolls of paper, you'd coat a big
16 roll of paper and you have end pieces and end rolls and stuff
17 like that. There's quite a bit of that. It can vary between
18 10 and 20 percent of the total amount in paper that's coated
19 with emulsion. When you coat it you generate this stuff and
20 when you make forms you generate it as well. They take the
21 forms and they slice them into 9 1/2 -- or 8 1/2 x 11 pages.
22 NCR's plan from the very beginning was that this stuff would be
23 recycled. In fact, they needed it to be.

24 We established in phase 1 that NCR knew that
25 that product it had on its hands was a waste product, and

1 Judge Jonker, therefore, found that they had arranged for the
2 disposal of a hazardous substance within the meaning of CERCLA
3 when they sold that product to unsuspecting paper mills like
4 those owned by Georgia-Pacific, International Paper, and
5 Weyerhaeuser.

6 We are here today to talk about an argument that
7 comes up in phase 2 only if Judge Jonker disagrees with us that
8 a hundred percent of the liability should be allocated to NCR.
9 Such a holding, we would note, is not without precedent.
10 Judge Griesbach in the Fox River case, a case very similar in
11 its factual predicate to this case, Judge Griesbach held that
12 NCR was a hundred percent responsible there. We think the same
13 result obtains here. But I certainly cannot rule out that
14 Mr. Lisner and his colleagues at the Cravath law firm, who are
15 some of the finest lawyers in the country, might have something
16 to say about that, and they very well might persuade
17 Judge Jonker that maybe it's something less than a hundred
18 percent. So we have to deal with the issue of how to allocate
19 the balance among the paper companies. And that's where this
20 motion comes in.

21 You've seen in the papers, Your Honor, reference to a
22 number of mills. I have brought with me today as a
23 demonstrative exhibit a map to help walk you through where
24 those mills are located because I think it helps -- certainly
25 makes it easier for me to understand this, and I suspect it

1 will for Your Honor as well. If I may.

2 *THE COURT:* I assume everybody is familiar with this
3 map?

4 That would be great. Thank you.

5 *MR. SIBLEY:* And this is purely a demonstrative,
6 Your Honor. This is a map that was used in connection with a
7 deposition last week, but it's just to provide some basic
8 orientation.

9 *THE COURT:* We've got a whiteboard for you, but I'm
10 glad that you've used this, because I don't think the
11 whiteboard would have been as efficient.

12 *MR. SIBLEY:* I doubt it would, and my handwriting
13 certainly would not have been sufficient.

14 There are as many as 14 mills that may have recycled
15 carbonless copy paper. I have -- on the first page of the map,
16 Your Honor, you see sort of clusters of facilities in the
17 Kalamazoo area and then up in the Plainwell/Otsego area.

18 If you flip to the second figure, you see the focus
19 around the Kalamazoo area. And if I could just run very
20 quickly through the pertinent mills there.

21 Down in sort of the bottom left there are two mills,
22 the Monarch Mill and the Bryant Mill. The Bryant Mill -- the
23 dot for the Bryant Mill is above what's called the Bryant Mill
24 Pond, but the discharge point for most of the Bryant Mill's
25 waste was into a point at the upstream of that pond.

1 I'm sure Your Honor knows this, but the Portage Creek
2 runs south to north, it intersects with the Kalamazoo River in
3 Kalamazoo, and then the Kalamazoo River runs north before
4 turning to the west and discharging into Lake Michigan.

5 The Bryant Mill on Portage Creek is the biggest and
6 we would submit the dirtiest of the mills during this time
7 period. You cannot read any of the literature, historical
8 literature about the PCB contamination of the river without
9 being struck by the extent to which the Bryant Mill contributed
10 PCBs and solids to Portage Creek and the river itself. In
11 phase 1 of the case, we established that IP owned that mill for
12 a 10-year stretch from 1956 to 1966.

13 The Monarch Mill was operated by
14 International Paper's lessee Allied Paper Corporation. The
15 Monarch Mill was -- International Paper did not own the
16 Monarch Mill.

17 If you go up into Kalamazoo and follow the river
18 upriver -- and I'll start with actually the Morrow Lake Dam and
19 we'll move downriver from there. You have the approximate
20 location of a mill known as the Rex Mill. That was operated
21 for a short time by Allied. It's not connected, as best we
22 know, to any of the parties in this case.

23 You see further downriver the Georgia-Pacific Mill.
24 That is a site, Your Honor, of the old Kalamazoo Paper Company.

25 **THE COURT:** I'm sorry, where are you?

1 **MR. SIBLEY:** I'm on Figure 2.

2 **THE COURT:** Okay.

3 **MR. SIBLEY:** And I am starting at Morrow Lake and
4 moving downriver.

5 **THE COURT:** I see. All right.

6 **MR. SIBLEY:** And the Rex Mill is north of the river,
7 the Georgia-Pacific Mill is north of the river.

8 Now, adjacent to the Georgia-Pacific Mill are two
9 historic mill sites. They are among the --

10 **THE COURT:** Do you mind if I mark up your --

11 **MR. SIBLEY:** I do not mind at all, Your Honor.
12 Please feel free.

13 **THE COURT:** So the water flows from Morrow Lake -- on
14 the map would be from right to left, and then -- because the
15 Kalamazoo River is flowing from east to west and then south to
16 north?

17 **MR. SIBLEY:** That is correct, Your Honor.

18 **THE COURT:** All right.

19 **MR. SIBLEY:** Now, next to the Georgia-Pacific Mill --
20 and they are not featured on this map, and I apologize for
21 that -- but there are two of the what are sometimes called the
22 12 or we prefer 14 mills. There are two mills there. There's
23 the National Gypsum Company facility and then the old Hawthorne
24 Paper Company mill. They are not figured there, but they are
25 right there in the vicinity of the Georgia-Pacific mill.

1 As you move up past the confluence of the
2 Kalamazoo River and Portage Creek to the north, you have on the
3 west bank of the river a facility known as the Sutherland Mill.
4 It's known as that because it was the Sutherland Paper Company
5 for many years. It was later acquired by the Brown Paper
6 Company and then ultimately acquired by my client, Fort James
7 Corporation, or one of its subsidiaries.

8 Further to the north you have the what's known as the
9 KVP Mill in the parlance of this case, the Kalamazoo Vegetable
10 Parchment Mill, made parchment paper. Also a mill formerly
11 owned by one of my clients, Fort James Corporation.

12 If you flip to Figure 3, Your Honor, you move further
13 downriver and you reach eventually Plainwell and the site of
14 the Weyerhaeuser Mill, the Plainwell mill, owned by
15 Weyerhaeuser until I believe the early seventies and then
16 acquired by the Simpson Plainwell Company. You'll recall we
17 talked about the Plainwell Company's role in connection with
18 the mediation that was the subject of the previous discovery
19 motion.

20 You move further downriver past the Plainwell -- the
21 old Plainwell Dam and you get to Otsego proper. And there are
22 two mills in Otsego. Only one of them is noted on this map.
23 The one that's noted is the old Hoerner-Waldorf MacSimBar Mill
24 owned by Hoerner-Waldorf until 1968. The mill was sold in an
25 asset deal to Mead Corporation and then went on and was sold to

1 Rock-Tenn, I believe, International Paper, and their papers
2 reference that.

3 There's also adjacent to that another mill that's
4 among the 14. It doesn't figure in this motion, but just in
5 the interest of completeness, there is what's known as the
6 Otsego Falls Mill historically owned by a number of companies,
7 one of which was known as the Menasha Corporation. None of the
8 parties in this case are connected to that facility.

9 Now, on the map, Your Honor, if we were to go -- in
10 the interest of having a map that's not -- doesn't have such
11 small print that we can't fit everything -- if you went over to
12 the east a little bit, you would come to Battle Creek. And in
13 Battle Creek there are two rather large paperboard mills, the
14 Fountain Street Mill and the Angel Street Mill. These are two
15 mills that make paperboard. And we believe the evidence shows
16 that these mills would have used potentially carbonless copy
17 paper. And given the behavior of these PCBs once they enter
18 the river, we believe that some of those PCBs would have found
19 their way all the way into the Superfund site. So they are
20 part of the equation as well.

21 When we talk about the 14 mills, those are the mills
22 that we are referring to.

23 Now, as I mentioned, some of the owners of these
24 mills have incurred -- are parties in the case -- some of the
25 former owners -- and some of those owners incurred costs to

1 clean up the site. Georgia-Pacific is one of them.
2 Georgia-Pacific has incurred north of a hundred million dollars
3 in cleanup costs to date. We expect that number to increase by
4 several multiples before all is said and done, and this case is
5 about figuring out who the CERCLA lia -- how that cost or past
6 costs and the expected future costs should be allocated amongst
7 the CERCLA-liable parties.

8 In phase 1 the Court held that NCR,
9 International Paper, and Weyerhaeuser -- Weyerhaeuser had
10 stipulated to liability -- were liable for -- under CERCLA.

11 With respect to the Bryant Mill, the basis for the
12 liability finding against International Paper, that makes -- by
13 dent of that liability finding, IP is jointly, we would submit,
14 jointly and severally liable for the cleanup of all downstream
15 stretches from that mill. That takes you from -- all the way
16 on Bryant Mill all the way down to Lake Michigan. All of those
17 stretches are IP's -- are within the ambit of IP's liability.

18 IP might argue in phase 2 that it should not be
19 liable for portions of the river that are upstream of the
20 confluence of Portage Creek as a result of its ownership of the
21 Bryant Mill, and that's an issue on which they would bear the
22 burden in phase 2.

23 The Court's job --

24 *THE COURT:* So are you contending that they are
25 liable for any pollution from the confluence up to Morrow Lake?

1 *MR. SIBLEY:* Certainly not as a result of their
2 ownership of the Bryant Mill, Your Honor. Equitably whether
3 they should bear some portion of the costs that have been
4 incurred there, that's a question. And candidly, Your Honor,
5 there are very few costs that have been incurred in those
6 areas. The way these PCBs behave in the environment, they flow
7 downstream, so the bulk of all the costs have been incurred,
8 and all costs that will be incurred in the future will be
9 incurred in downstream reaches. So I think theoretically that
10 would be an argument IP could make, that certain areas there
11 are not their responsibility, but that's their burden to prove
12 in phase 2.

13 In phase 2 the Court will allocate equitably
14 responsibility for past and future cleanup costs downriver.
15 And this inquiry, Your Honor, is sweeping.

16 As the Seventh Circuit said in the Environmental
17 Transportation Systems case, 969 F.2d. 503 at 507, "The court
18 is to allocate response costs among liable parties using such
19 equitable factors as the court determines are appropriate."
20 And, Your Honor, the inquiry is just as broad as that statement
21 might suggest. And the Sixth Circuit in the R.W. Meyer case,
22 932 F.2d. 568 at pages 572 to '73, notes that the factors are
23 not limited to the percentage of a party's improper conduct
24 that causally contributed to the toxicity of the site in a
25 physical sense.

1 It is sweeping. The Court has broad discretion to
2 consider whatever factors it determines are appropriate.

3 And in the Fox River case, the Appleton Papers cases
4 which is cited in our papers, Your Honor, Judge Griesbach noted
5 that the cases overwhelmingly suggest that a court's equitable
6 powers are broad and the considerations it chooses are not
7 bound by narrow and legalistic arguments.

8 Certainly the case, Your Honor, that factors the
9 Court considers go well beyond the narrow facts that might be
10 necessary to establish a party's liability, other issues --
11 CERCLA being a strict liability statute -- other issues such as
12 fault, knowledge, concealment, those types of factors enter
13 into the equation.

14 Now, it is certainly relevant in phase 2 that -- the
15 operations of these 14 mills I should say is certainly relevant
16 in phase 2. IP has acknowledged as much. IP has asked
17 Georgia-Pacific questions about 12 of the 14 mills I
18 identified, including the MacSimBar Mill.

19 Your Honor, we believe the evidence shows that
20 International Paper -- just to put this out there -- it's clear
21 that International Paper acquired Champion Corporation which
22 had acquired Hoerner-Waldorf. Hoerner-Waldorf owned that mill
23 until 1968. The facts on this are not in meaningful dispute.

24 **THE COURT:** Which one is that?

25 **MR. SIBLEY:** The MacSimBar Mill, Your Honor, is in

1 Otsego. It is on my -- on page 1 of the map, if you look, it's
2 the one that's called the Mead Hoerner Mill. We have given it
3 that title because Mead acquired it in 1968. So these mills
4 sometimes go by multiple names, and in some cases we've
5 included both names.

6 *THE COURT:* What's the other name you're referring to
7 it as?

8 *MR. SIBLEY:* What's that?

9 *THE COURT:* What's the other name you're referring to
10 it as?

11 *MR. SIBLEY:* I'm sorry. MacSimBar is
12 M-A-C-S-I-M-B-A-R, and that's how the parties have described
13 this mill in their papers. And I apologize for not having that
14 label on this exhibit.

15 The operations at that mill and all of these mills is
16 relevant. How much did that mill discharge in terms of PCBs?
17 How much carbonless copy paper would it have used?

18 It's plainly relevant to the analysis, and
19 International Paper has acknowledged as much. They have served
20 discovery on Georgia-Pacific asking Georgia-Pacific to
21 acknowledge, to tell what it knows about how much the total
22 mass of PCBs that that mill might have put out into the
23 environment. Clearly a relevant factor.

24 It's relevant, Your Honor, in the same way that the
25 fault of nonparties can come into the equation in a typical

1 personal injury action under common law. You would have a
2 liability determination, but then the parties might try and
3 show that there are orphan shares of liability, other parties
4 that contributed to the harm, and their liability should be
5 taken into account. So it comes into the equation.

6 And again, that's not a controversial proposition.
7 International Paper has agreed to answer questions about the
8 operations at the MacSimBar Mill, among others, recognizing
9 that it's a relevant consideration.

10 International Paper has also asked Georgia-Pacific to
11 answer questions about Georgia-Pacific's connection to some of
12 these mills. Now, Georgia-Pacific has not been the subject of
13 any liability finding. We have performed the work voluntarily
14 pursuant to administrative orders on consent. We have not been
15 sued in the way that IP, NCR, and WeyCo had to be sued to be
16 brought into the case. So there was no liability discussion
17 about -- for Georgia-Pacific in phase 1.

18 Historically the regulatory authorities have noted
19 Georgia-Pacific's ownership of the Kalamazoo Paper Company mill
20 as the ownership interest that makes it liable potentially
21 under CERCLA, and it's certainly that ownership interest that
22 has compelled Georgia-Pacific under the law to cooperate with
23 the authorities and clean up the river to the tune to date of
24 over a hundred million dollars.

25 **THE COURT:** Which mill is that one?

1 ~~MR. SIBLEY:~~ That mill, Your Honor, is if you --
2 probably the easiest thing to do is to look at Figure 2.

3 ~~THE COURT:~~ Okay.

4 ~~MR. SIBLEY:~~ And it is the mill that's marked
5 "Georgia-Pacific."

6 ~~THE COURT:~~ It's also known as the Kalamazoo Paper
7 Company?

8 ~~MR. SIBLEY:~~ Yeah. Until 1967 the company that owned
9 that mill was the Kalamazoo Paper Company, and that's who had
10 owned it for decades. In 1967 Georgia-Pacific purchased the
11 Kalamazoo Paper Company, and thereafter it was known as the
12 Georgia-Pacific Kalamazoo mill.

13 In phase 2, as I mentioned, Your Honor,
14 International Paper has asked Georgia-Pacific about its
15 ownership of mills other than the Kalamazoo Paper Company Mill,
16 the one that has brought Georgia-Pacific into the case to begin
17 with, into this cleanup to begin with. It specifically asked
18 about the Hawthorne Mill which was adjacent to the
19 Georgia-Pacific Mill, and they specifically asked whether
20 Georgia-Pacific is the successor in interest to the
21 Hawthorne Paper Company. And the relevance of that inquiry,
22 Your Honor, is plain. If Georgia-Pacific owned -- is the
23 successor to the company that owned that mill, assuming NCR is
24 not found a hundred percent responsible, some portion of that
25 mill's discharge, IP would argue, should be the responsibility

1 of Georgia-Pacific.

2 Now, we don't think these kind of volumetric
3 considerations, total mass that's put out, is the primary,
4 secondary, or even tertiary factor that drives the equitable
5 analysis, but it's certainly relevant. And the fact that one
6 of the parties in this case may have owned one of these mills
7 and that mill -- let's assume that it's established that that
8 mill discharged into the river -- it's certainly a relevant
9 factor. And they have asked us that question and
10 Georgia-Pacific answered it.

11 Georgia-Pacific propounded the same type of question
12 to International Paper. The question was: Did you own --
13 admit that you owned the MacSimBar Mill and those two mills
14 identified in Battle Creek. IP has refused to answer.

15 The basis for their objection is that the facts on
16 which we seek discovery are facts that if established in
17 phase 1 would have made International Paper independently
18 liable. They say that because we did not pursue those bases of
19 liability in phase 1, we are precluded from doing so in
20 phase 2.

21 IP does not dispute that what went on at these mills
22 is relevant. They can't. They have asked the same discovery
23 about these facilities to us. They say that -- their objection
24 is more narrow than that. They will admit -- they will answer
25 questions about the operations of the mills, how much -- they

1 will look into how much carbonless these facilities used, they
2 will state their position, but they take the position that they
3 cannot be made to answer questions about whether they owned the
4 mill. Because had we chosen to pursue that in phase 1, it
5 would have shown that they are -- we could have established
6 their liability on that basis.

7 Your Honor --

8 *THE COURT:* You could have or could not have?

9 *MR. SIBLEY:* We could have. We could have. CERCLA
10 is a beautiful statute in this sense, and I have to acknowledge
11 it: Owner and operator liability is fairly easy to establish.
12 There are some cases where ownership is not sufficient.
13 International Paper thought that this would be one of them with
14 respect to its ownership of the Bryant Mill based on its lease
15 interest, but that was litigated in phase 1. And it turns out
16 that they were in fact an owner as we had contended. But
17 that's the rare instance. Ordinarily owner and operator
18 liability is not litigated because it is a black-and-white
19 determination. In fact, Your Honor, it's one to which
20 International Paper has admitted previously. If I could hand
21 up another document. I do take some satisfaction in being able
22 to hand up International Paper's response to EPA's 2003 104(e)
23 request, which I know Your Honor is familiar with from the
24 proceedings the last time.

25 If I could, Mr. Parker.

1 Now, this is a document that I believe NCR obtained
2 from EPA pursuant to a FOIA request and by the agreement of the
3 parties they produced it. And you'll see on the first page
4 International Paper is responding to a request and they note
5 that the request identified three facilities: The
6 Fountain Street Mill, the Angel Street Mill, the MacSimBar
7 facility.

8 The first two, Your Honor, are those Battle Creek
9 paperboard mills that we mentioned, and the MacSimBar is that
10 one in Otsego. In IP's answers to questions -- now, we don't
11 see the rest of their answer. Maybe Mr. Parker can illuminate
12 us on this. But they acknowledge that they owned
13 Fountain Street and Angel Street. At least as that term was
14 defined in the request. I, unfortunately, don't have a copy of
15 the requests with me, Your Honor. But these mills have been
16 known and IP's connection to these mills has been known for
17 quite some time. IP has known for quite some time that they
18 had -- they had some connection to it. And it's an easy
19 question to answer. It's pure corporate successorship.

20 With respect to the Fountain Street and Angel Street
21 mills, those mills ultimately rolled up to -- were owned by the
22 St. Regis Paper Company. St. Regis is acquired by Champion.
23 International Paper acquires Champion. It's black and white.
24 And those are the types of questions we've asked them to admit.
25 Just admit that chain of corporate successorship.

1 With respect to the MacSimBar Mill it's a little
2 different. The Hoerner-Waldorf Corporation is acquired by
3 Champion, then IP acquires Champion. St. Regis doesn't come
4 into that mix. But these are the easy questions about these
5 mills. These are the ones that don't take a whole lot of
6 effort to answer. And we think they should.

7 Now, IP, again, has objected because there is some
8 overlap between the equitable inquiry, considering all of the
9 factors, and the facts that might be used to establish
10 liability. And we submit, Your Honor, that there is no legal
11 basis for this objection. Indeed, throughout IP's brief they
12 don't cite a single case that supports this type of narrow and
13 legalistic rule of exclusion as a discovery matter at all.
14 They don't cite even a case that says that those considerations
15 are taken off the table in phase 2. In fact, the cases
16 uniformly push in the other direction.

17 I would point most notably to the Appleton Papers
18 decision where one of the parties in that case tried to argue
19 very narrowly that certain factors could not be considered
20 because that wasn't the narrow basis of their liability, but
21 the Court had none of that. It said, "I'm not limited by those
22 things. I can consider everything." The weight the judge
23 applies to those things, that's a different question. But
24 that's not why we're here. IP wants to take the issue
25 completely off the table. To we'll have a dossier, one might

1 imagine, on the Hoerner-Waldorf MacSimBar Mill and the one --
2 with a curious blind spot, a curious redaction over the
3 relevant consideration of who owned that mill before 1968. And
4 that's just not something that CERCLA case law, the statute or
5 the case law recognizes.

6 *THE COURT:* Let me interrupt you for just a moment so
7 that I make sure I understand the facts. Which you are setting
8 out very clearly, if I may say so.

9 As far as Fountain Street Mill and Angel Street Mill,
10 which you referred to as the Battle Creek mills, they are not
11 on this chart?

12 *MR. SIBLEY:* They are not.

13 *THE COURT:* They are farther to the east?

14 *MR. SIBLEY:* Farther to the east. They are.

15 *THE COURT:* All right. And so how much farther would
16 they be on this map if the map were to extend?

17 *MR. SIBLEY:* Your Honor, I hate to speculate.
18 Perhaps another six inches to the east on the map.

19 *THE COURT:* All right.

20 *MR. SIBLEY:* Your Honor, Battle Creek is a good
21 distance from Kalamazoo. A fact we would readily concede.

22 *THE COURT:* All right.

23 *MR. SIBLEY:* And, Your Honor --

24 *THE COURT:* And so the water -- the river flows from
25 Battle Creek toward this confluence and would pass through

1 Morrow Lake; is that right?

2 MR. SIBLEY: That's correct.

3 THE COURT: And that's the Kalamazoo River?

4 MR. SIBLEY: That is correct, Your Honor.

5 THE COURT: All right. And it passes through or over
6 the Morrow Lake Dam?

7 MR. SIBLEY: That is correct, Your Honor.

8 THE COURT: And if there were these contaminants
9 released by Fountain Street Mill and Angel Street Mill, they
10 would have to flow down all of this way through Morrow Lake and
11 continue on to get to the area where you're responsible for?

12 MR. SIBLEY: That's correct, Your Honor.

13 THE COURT: Were you held responsible for anything
14 upstream from the Georgia-Pacific rotation here? Between
15 Georgia-Pacific and Morrow Lake?

16 MR. SIBLEY: Georgia-Pacific has incurred costs in
17 those areas.

18 THE COURT: How far upstream?

19 MR. SIBLEY: Up to Morrow Lake. There has been
20 little, if any, actual cleanup work done upstream of
21 Morrow Lake.

22 Now, Your Honor, I would submit -- and Mr. Parker has
23 correctly acknowledged in his paper -- that very little
24 Aroclor 1242 -- and let me quickly explain -- just take a step
25 to the side really quickly because I'm going to use some of

1 these terms, and it took me a while to understand them, and I'm
2 sensitive to the fact that you haven't spent as much time with
3 this as we have. That Aroclor is the trade name that the PCB
4 that NCR purchased from Monsanto went by. The 1242, the
5 numbers refer to the number of chlorine compounds in the
6 mixture. And I'm not enough of a chemist to competently
7 explain the difference between Aroclor 1242 and 1254 really
8 beyond what I've told you.

9 In Morrow Lake there is some 1242. There's also a
10 fair amount of 1254. 1254 was used in other applications,
11 industrial applications like capacitors and transformers and
12 that type of thing. And that's what you see in Morrow Lake.

13 Now, Mr. Parker correctly notes that there's not a
14 whole lot of 1242 there. And they haven't done a whole lot of
15 cleanup work upstream of Morrow Dam. And that's a very
16 important point. And but for, Your Honor, a contention that IP
17 advanced in phase 1, we might not care about those mills. We
18 may leave them off the table and we wouldn't do any discovery
19 at all. But IP has staked out the position that carbonless
20 copy paper would have been used predominantly by paperboard
21 mills.

22 If I can go back to my map, Your Honor, and explain
23 kind of what a couple of these mills did. The three mills
24 we're talking about in this motion are paperboard mills. The
25 two in Battle Creek and the one up in Otsego. They made --

1 when I say paperboard, Your Honor, I'm talking about cardboard
2 boxes. Cereal boxes. Corrugated boxes that you might store --
3 you know, bankers' boxes you might store paper in, that type of
4 thing.

5 The theory which was articulated in phase 1,
6 Your Honor, by their expert, Dr. Frank Woodard. And I've
7 brought up some excerpts of his testimony. Brought with me
8 today, Your Honor, excerpts of his testimony.

9 Oh, I see what I did here. Your Honor, I'm sorry.
10 If I may have that back. I gave you -- the testimony is in two
11 places, and I gave you one of the places.

12 **THE COURT:** No harm done. I didn't read it yet.

13 **MR. SIBLEY:** Your Honor, I took Mr. -- Dr. Woodard's
14 deposition, and if you'll look, the first time this theory was
15 articulated was at his deposition which was taken on July 20th,
16 2012, and you'll see we've highlighted the places where this
17 came up. And we asked him about the documents that show the
18 delivery of NCR Paper to the Dreyfuss Paper Corporation, which
19 was a wastepaper broker based in Kalamazoo, and I was asking
20 questions about the logical destination of that, and he
21 answers, and this is at page 119 of that transcript, "The most
22 logical mill for those bales of broke to go to would have been
23 the Brown Boxboard Company."

24 And when we switch over to page 136 we get a little
25 more elucidation of that as to why it is he believes that. And

1 I don't need to belabor the point, but the testimony is all
2 included there.

3 His theory is that these boxboard mills would have
4 used this carbonless paper because they were less concerned
5 with the quality of the end product. Whereas boxes are just
6 brown boxes. They don't have to meet any color or brightness
7 requirements.

8 Printing paper, specialty papers like, you know,
9 paper you would run through a printer today and the paper that
10 was made by the Bryant Mill in the 1954 to 1956 time period --
11 well, really throughout their operation, which was they made
12 the highest-quality specialty grades. They made paper for
13 Encyclopedia Britannica and stuff like that. And their theory
14 was -- his theory was this mill wouldn't have used any of this
15 stuff because of its propensity to turn the stock blue.

16 There is some evidence in phase 1 about how that
17 might happen. It was a problem that NCR itself identified. If
18 you read Judge Jonker's opinion, he talks about this. The
19 problem was fixed very early on and NCR taught the paper
20 companies how to recycle this paper and to deal with the
21 problem.

22 We don't agree with Dr. Woodard's theory, but he's
23 trying to push paper, carbonless paper away from the
24 Bryant Mill onto boxboard mills. My client, Georgia-Pacific,
25 the Sutherland Mill which is on the map, is a boxboard mill.

1 If that's their theory --

2 THE COURT: Which one is that? I'm sorry.

3 MR. SIBLEY: If you look just -- it's the first mill
4 on the upstream -- or I'm sorry, downstream of the confluence
5 of Portage Creek and the Kalamazoo River.

6 THE COURT: I see. That's your mill?

7 MR. SIBLEY: That's owned by Fort James, yes.

8 Historically owned by Fort James. His theory is it all went
9 there.

10 THE COURT: That's a Georgia-Pacific?

11 MR. SIBLEY: It is. Fort James Corporation was the
12 product of a merger between James River Paper Company and
13 Fort Howard. They named themselves Fort James, and then
14 shortly after that the entire company was acquired by
15 Georgia-Pacific. Fort James Corp. is one of the named
16 plaintiffs in this case. We've kind of lumped them together as
17 Georgia-Pacific, but that's how that -- how they come into
18 play.

19 Anyway, that's the theory that was articulated. That
20 it all went to the boxboard mills. Well, Your Honor, if that's
21 their theory, it's certainly relevant that International Paper
22 owned some of the very facilities where they say this paper
23 would have gone. And it's relevant in any number of respects.
24 The fact that they owned it is a relevant consideration. The
25 fact that they operated it would be relevant. They are

1 contributing to the problem.

2 As we get to these downstream areas up downstream of
3 Otsego such as the former Otsego impoundment, and Judge Jonker
4 is asked to figure out who should pay what share in that area
5 of the river, certainly it's relevant that International Paper
6 owned one of the mills where International Paper's own expert
7 says this paper would have gone.

8 *THE COURT:* So their expert says this waste product
9 was sent to the boxboard companies or the -- points out
10 Sutherland Mill. You come back and say, "Well, if that's the
11 case, IP owns three of these companies -- three of these mills,
12 the MacSimBar and the two Battle Creek mills, Fountain Street
13 and Angel Street"?

14 *MR. SIBLEY:* That's correct. Now, Your Honor, we
15 disagree with his theory. We don't think it's right. We don't
16 think Dr. Woodard is really qualified even to offer that
17 opinion. But it's certainly relevant. It's an issue they put
18 at issue in phase 1. And Mr. Parker is --

19 *THE COURT:* Still at issue? Or did Judge Jonker not
20 accept that? Has that issue been resolved?

21 *MR. SIBLEY:* It's very much still at issue. He
22 didn't resolve -- he held that in phase 1 -- Mr. Parker loves
23 to mention -- that for the 1954 to '56 period the evidence was
24 not sufficient to show that the Bryant Mill recycled carbonless
25 copy paper. That was the first two years that --

1 THE COURT: Say that again.

2 MR. SIBLEY: That from 1954 to 1956 -- the 1956 date
3 being significant in the case, Your Honor, because that's when
4 International Paper leased the Bryant Mill to Allied Paper
5 Company. Allied Paper operating it from that point forward.
6 International Paper's theory was that lease was effectively a
7 sale and that they were not the owner within the meaning of
8 CERCLA. And that's what phase 1, the bulk of phase 1 was
9 about. But we also -- we had evidence that we believe
10 demonstrated that they would have used the paper before 1956.
11 But Judge Jonker ruled against us on that.

12 The issue, though, is still in play in phase 2. I
13 mean, the extent to which any of these mills would have had a
14 propensity to use carbonless is relevant. You know, that
15 theory could be extended to the post-1956 period.

16 Mr. Parker and his colleagues could call on
17 Dr. Woodard again to articulate this theory and try to convince
18 Judge Jonker that the Bryant Mill, notwithstanding the
19 remarkable environmental evidence showing Aroclor 1242 in the
20 disposal areas for the Bryant Mill and then Portage Creek,
21 nonetheless might argue that they use less than say the
22 Georgia-Pacific mill and certainly less than the Brown boxboard
23 mill. So that's the theory in phase 2. And if that's the
24 case, it's certainly fair for us to note as an equitable factor
25 that one of these boxboard mills, the MacSimBar Mill, and it

1 was owned by International Paper, by a predecessor to
2 International Paper. The same with respect to the Battle Creek
3 mills.

4 We'd note also that if the Battle Creek mills were
5 recycling carbonless to the extent that Dr. Woodard says, you
6 would see much more 1242 in Morrow Lake than you do. So it all
7 comes together. And it's part of a mix. It's discovery.
8 We're working out all of these factors and we're discovering
9 these facts.

10 The extent to which Judge Jonker may choose to rely
11 on that fact remains to be seen, but it's certainly fair game
12 for discovery. In fact, Your Honor, in phase 1 it wasn't just
13 the 1954 to 1956 and the secured creditor exception that was
14 the subject of dispute between Georgia-Pacific and IP.
15 International Paper also owned a chunk of -- owned and operated
16 a chunk of what's broadly known as the Bryant Mill facility
17 from 1956 through 1965. It's not depicted on this map, but
18 it's known as the Panelyte facility. If you read
19 Judge Jonker's opinion, he talks about how he didn't need to
20 reach that question about whether IP was responsible as an
21 owner at the time of discharge with respect to its ownership
22 and operation of the Panelyte facility, which included a large
23 chunk of Bryant Mill Pond which is where the Bryant Mill's
24 waste went. So I didn't need to reach that. I'll deal with
25 that in phase 2.

1 And he's absolutely right. All we needed to show was
2 that IP had a seat at the table. And we established that. And
3 the question now is, you know, let's throw in all the equities
4 and let's figure out who pays what. Assuming we even need to
5 get to the question of equities between the mill companies.

6 So Judge Jonker clearly contemplated that issues
7 going beyond the narrow basis on which he found a party liable
8 could be considered in phase 2.

9 IP also objects that this would be burdensome and
10 prejudicial. Your Honor, again, this is the easy question.
11 It's not as though by sustaining International Paper's
12 objection you would keep out discovery as to these other
13 facilities. We're still going to have discovery on them. The
14 only thing is you would have a little blind spot over the
15 question of who owned the facility from -- the MacSimBar
16 facility up until 1968 and the Battle Creek facilities during
17 the relevant years there.

18 I've already handed Your Honor the 104(e) response.
19 IP has already done its work on this. They know the answer.
20 And I would submit, Your Honor, if they could have denied it
21 truthfully, they would have. They have objected because the
22 answer is, as we all know, they owned these facilities.

23 And again, it's not a surprise. It's not a surprise
24 that this has come up. Mr. Parker correctly notes that there
25 was a time during phase 1 when there was some consideration of

1 bringing Mead into the case. Weyerhaeuser moved to add Mead
2 and Judge Jonker said, "It's too late. We're well too far
3 along in this phase 1 to do that."

4 Had Mead been brought in, certainly the Otsego Mill
5 would have been front and center. But Georgia-Pacific elected
6 to focus on the Bryant Mill. The Bryant Mill is, Your Honor --
7 and I -- we didn't attach them to our papers, and I suspect
8 that unless we were back in front of you on another discovery
9 motion, you may not have occasion to go read them, but the
10 public documents about this site, one is struck instantly by
11 the role of the Bryant Mill. It is the big, the big Kahuna.
12 It's the big mill that's doing -- that's responsible for a
13 large chunk of the mess that we're cleaning up. And IP's
14 connection to that mill over that 10-year period which we've
15 established is more than sufficient to make it jointly and
16 severally liable all throughout the river. And that's why that
17 was the focus of our case in phase 1.

18 **THE COURT:** Why didn't you try to add Mead at an
19 earlier stage so that you wouldn't have had the objection from
20 Judge Jonker that it was too late to add Mead?

21 **MR. SIBLEY:** We did not seek to add Mead. We have
22 settled with Mead. We have a settlement agreement with them,
23 and we've resolved their liability for their contribution. So
24 we did not sue Mead.

25 Now, these other parties could have brought a

1 third-party claim to bring them to the table. They elected not
2 to do so until it was too late in Judge Jonker's mind to do
3 that.

4 *THE COURT:* Do you know why they waited so long?

5 *MR. SIBLEY:* That's a question for Mr. Parker. I
6 don't know.

7 But adding the -- adding a claim against
8 International Paper as to the Otsego Mill didn't give us
9 anything that we wouldn't already have by the claim against the
10 Bryant Mill. And, frankly, that's where the -- in terms of
11 equitable allocution, to the extent volume comes into the
12 equation, that's where the cost/benefit analysis tilts in favor
13 of pursuing a claim against IP. If we're dealing just with the
14 Otsego Mill. Again, under our theory, we don't think the
15 boxboard mills used very much of this stuff at all. To the
16 extent they did, it did not result in the discharge of PCBs in
17 the same quantities that you're seeing from the Bryant Mill.
18 But that's our theory. IP has a different view of that. And
19 so it certainly comes into the equation in phase 2.

20 *THE COURT:* It sounds like your argument is that
21 these boxboard mills are not a big player, but we really don't
22 want to talk about them, but if they are going to be -- if they
23 are going to be brought into the argument, then let's bring the
24 other guy's boxboard mills in too and so we need to know about
25 them.

1 ~~MR. SIBLEY:~~ That's exactly right. And the role
2 generally -- it's not just that they have opened the door. I
3 think the contribution of all of these facilities is relevant
4 to some extent. Judge Jonker is going to have to decide how to
5 deal with so-called orphan shares. These mills that --

6 ~~THE COURT:~~ What are the orphans? I read that in
7 your brief. I understand the argument, but what's --

8 ~~MR. SIBLEY:~~ Yeah, it's funny.

9 ~~THE COURT:~~ Can you point those out on the map here?

10 ~~MR. SIBLEY:~~ Yeah, I'm happy to do so. First of all,
11 let me say, I don't think there are any orphans, because all of
12 these mills recycled NCR's paper. So as a technical matter I
13 would say that.

14 Now, as between the paper companies, if we take NCR
15 out of the equation, there are some companies that none of
16 Georgia-Pacific, Weyerhaeuser, or International Paper owned.
17 And let me tick through those. And I'm going to set aside the
18 three that are the subject of this motion that we think IP
19 owned.

20 But the Rex Mill, none of the parties are connected
21 to that as best we know.

22 The King Mill is probably an orphan. There is some
23 evidence, Your Honor, that the Bryant Mill and the King Mill
24 were coordinated to some extent in their operations. We're
25 still sort of sorting that out. I don't want to say

1 definitively that IP has no connection to that, but it's
2 probably an orphan as among the paper companies.

3 The Monarch Mill, same thing. Probably an orphan.
4 But there is some evidence showing that those three mills --
5 Monarch, King, and Bryant -- were coordinated. So I don't want
6 to rule that out entirely, but it's probably an orphan.

7 Moving downstream, Sutherland and KVP are owned by a
8 former Fort James/Georgia-Pacific Mill, so they are not
9 orphans.

10 The Weyerhaeuser Mill, of course, that's
11 Weyerhaeuser. It's not an orphan.

12 And then a mill that is not depicted on this map
13 right adjacent to what's called the Mead Hoerner Mill is the
14 Otsego Falls Mill, and it is almost certainly an orphan.

15 **THE COURT:** What's the name of it?

16 **MR. SIBLEY:** The -- it's called -- we've called it in
17 the case the Otsego Falls Mill.

18 **THE COURT:** Huh.

19 **MR. SIBLEY:** It's right there at the Otsego Falls
20 Dam.

21 But the first question, of course, is are these
22 really orphans? Is it the case that none of these mills are
23 connected to any of the parties here? Should we treat them as
24 orphan shares?

25 So, for example, Your Honor, if the MacSimBar Mill

1 was a true orphan, one way to allocate responsibility for its
2 contribution to the river would be to take the parties'
3 relative shares for the rest of the river, or at least that
4 portion of the river, and just apply that to that orphan and it
5 really comes out as a wash. It doesn't tilt the analysis at
6 all.

7 But if International Paper owned that mill at the
8 time it was discharging, that would suggest a different way to
9 treat that mill. That their share should be increased.
10 Certainly it's a relevant consideration that Judge Jonker can
11 consider.

12 Now, Mr. Parker and International Paper may argue
13 that that shouldn't come into play as a matter of equity
14 because we didn't pursue it in phase 1. I don't think that's
15 right. That's a fair argument to raise with Judge Jonker,
16 though. But that's a trial argument. That's a motion in
17 limine. That's something you raise in your post-trial brief.
18 It's not off-limits within the meaning of Rule 26 discovery.
19 You know, the sweep of Rule 26 is broad to begin with. You
20 apply the Rule 26 relevancy standard to a CERCLA allocation
21 proceeding, where the judge can consider literally almost any
22 factor he wants to, and you have a very, very wide discovery
23 standard indeed. I would submit that what we're talking about
24 here falls comfortably within the heart of the type of inquiry
25 that gets made in a CERCLA case, and we think these are

1 questions that IP should be made to answer.

2 *THE COURT:* Where is the Rex Mill and the King Mill?

3 *MR. SIBLEY:* If you -- let's look at Figure 2,
4 Your Honor. I think that's probably the easiest place to look.

5 The Rex Mill is kind of right in the middle of the
6 document. It's about two, three inches to the left of
7 Morrow Lake Dam on the north bank of the --

8 *THE COURT:* I see. I'm sorry.

9 *MR. SIBLEY:* -- Kalamazoo River.

10 *THE COURT:* All right. And the King Mill?

11 *MR. SIBLEY:* The King Mill is --

12 *THE COURT:* That's it.

13 *MR. SIBLEY:* Yeah. So the Rex Mill, Your Honor,
14 we're still doing discovery. I don't want to box myself in on
15 any of this. But I think the Rex Mill is a fairly minor
16 contributor overall.

17 The King Mill was a deinking mill that was operated
18 by Allied. Owned and operated by Allied. As a general matter,
19 as a general proposition, Your Honor, deinking mills -- and
20 there are -- among the deinking mills are Georgia-Pacific's
21 Kalamazoo Paper Company Mill, the King Mill, the Bryant Mill,
22 the Monarch Mill, although only for a couple of years, and then
23 the Weyerhaeuser Mill up until 1962. The deinking mills were
24 the mills that took paper and they -- it wasn't just paper
25 recycling, it was a deinking process that removed coatings and

1 inks. And our view, and we believe that the evidence supports
2 this, is that the deinking mills were the primary destination
3 for carbonless. That doesn't mean it wasn't used at boxboard
4 mills. It could have been. Indeed it likely was. But not
5 nearly to the same extent as the deinking mills.

6 Moreover, the deinking mills, given the nature -- the
7 quality of the paper that those mills produced, they would have
8 generated greater quantities of waste that would need to have
9 been treated to avoid putting contaminants into the river.
10 Although I would note that there was no treatment system in
11 place at the time that would have prevented the discharge of
12 PCBs into the environment. It was not on anybody's radar
13 screen at that point.

14 *THE COURT:* The diagram there went further away from
15 the river than the other mills, but I see that there's the
16 King Highway Landfill between the King Mill and the river. Is
17 that the landfill for the King Mill?

18 *MR. SIBLEY:* Not for the King Mill, Your Honor. That
19 actually was a facility that was used by Georgia-Pacific.
20 We've noted -- this document has been used for other purposes.
21 We've noted on the map some of the landfills and disposal areas
22 just in a general sense.

23 *THE COURT:* How did the King Mill get to the river
24 then?

25 *MR. SIBLEY:* There is a storm -- there's a sewer line

1 that runs out basically almost due north, and that's how it
2 gets -- how it both draws water -- it doesn't draw water
3 through the sewer line, but it pipes it from the river and then
4 it discharged to the river.

5 The same with the Rex Mill. It's not -- I believe
6 there may have been a canal that connected the Rex Mill to the
7 river itself.

8 *THE COURT:* Thank you.

9 *MR. SIBLEY:* Your Honor, I've -- you've been very
10 generous with your time. This is plainly relevant evidence.
11 There is literally no precedent for the objection that IP has
12 lodged to it. It's a unique position to accept that discovery
13 as to these mills is relevant broadly except for the question
14 of whether you owned it. And I think the reason why they don't
15 want to acknowledge that is because it's a harmful fact. And I
16 just don't -- there's no basis for recognizing that type of
17 objection. We would ask that the motion be granted and that
18 IP's objections be overruled and that they be made to answer
19 discovery. Thank you, Your Honor.

20 *THE COURT:* Thank you.

21 Counsel.

22 *MR. PARKER:* Thank you, Your Honor. Good morning.

23 *THE COURT:* Good morning.

24 *MR. PARKER:* Judge, we're here to decide if
25 Georgia-Pacific can pin liability on International Paper in

1 phase 2 for three mills which were not the subject of liability
2 in phase 1. And I think the answer to that question is no.
3 It's a question that ought to be answered now before the
4 parties spend a lot of money and relitigate all of the issues
5 that were decided in phase 1 regarding the Bryant Mill and not
6 something that, as Mr. Sibley has suggested, is appropriate for
7 a motion in limine before trial.

8 In advance of the very first Rule 16 planning
9 conference in this case held on June 27th, 2011, a conference
10 at which Georgia-Pacific advocated dividing this case into two
11 phases, a liability phase and then an allocation phase, the
12 parties filed a Joint Status Report with the Court. Now, we've
13 attached that Joint Status Report as Exhibit D to our brief.
14 It's actually docket number 78. And at page 5 Georgia-Pacific
15 has its statement of the case, the portion of that Joint Status
16 Report that it drafted, and it says the following, and I quote:
17 "Georgia-Pacific further contends that International Paper
18 should be wholly responsible relative to Georgia-Pacific for
19 all costs and damages attributable to the facilities and
20 activities for which International Paper has CERCLA liability
21 as an owner or operator. This includes the Bryant Mill which
22 IP owned and operated and leased at various times."

23 Let me reread a portion of that, Judge.
24 "Georgia-Pacific contends that International Paper should be
25 wholly responsible relative to Georgia-Pacific for all costs

1 and damages attributable to facilities and activities for which
2 International Paper has CERCLA liability." That's what they
3 said to the Court. That's what they represented to the Court
4 phase 1 would be about. And they spent an inordinate amount of
5 time, as Judge Jonker said -- by the way, Judge, those are the
6 only two sentences in that whole Joint Status Report where they
7 talk about International Paper.

8 And we went through a phase 1 trial for two weeks at
9 which 25 expert and lay witnesses were called, which
10 Judge Jonker noted in his opinion and order had a trial record
11 that covered over 50 binders with thousands of pages. In that
12 trial they established CERCLA liability against my client not
13 as an operator, they failed to do that, which Mr. Sibley
14 suggested was something easy to do. They could not do that.
15 They established CERCLA liability against International Paper
16 as to our ownership of one facility, the Bryant Mill, from 1956
17 to 1966. They did not establish our CERCLA liability for two
18 mills that are 25 miles upstream in Battle Creek. They did not
19 establish our CERCLA liability for the Otsego MacSimBar Mill
20 which is the furthest downstream of all of these mills. But
21 now that we're in phase 2 they want to try to use the back door
22 to bring those facilities in and somehow pin liability and,
23 therefore, allocation on International Paper. But they can't
24 do that. They've got to go through the front door of phase 1
25 liability and show that we have responsibility for those

1 facilities before they can do that. Having decided not to do
2 it in phase 1 and not to pursue those other three mills, they
3 can't do it now.

4 Now, I apologize that you are getting such a factual
5 background on this case, Judge, but it is helpful, I think, in
6 trying to understand what's going on here. And as you now, I
7 think, understand, we're in phase 2 of a two-phase case about
8 CERCLA liability resulting from PCBs being in the
9 Kalamazoo River.

10 At the beginning of the case Judge Jonker ordered
11 that we would try it in two phases. Phase 1 was liability;
12 phase 2 was allocation. And as we talked -- as I mentioned, we
13 had this two-week trial, all of these witnesses, all of these
14 exhibits to establish whether or not we, International Paper,
15 had CERCLA liability for a single mill, the Bryant Mill. No
16 other mill.

17 Now, the Court found that we were liable as an owner
18 only for a 10-year period during which we owned the
19 Bryant Mill.

20 **THE COURT:** Is CERCLA liability for the mill or for
21 the contamination of the river?

22 **MR. PARKER:** I believe it's clear, Judge, that it is
23 for the mill. And in fact, if I can read from Judge Jonker's
24 opinion, he quotes CERCLA and says, "A defendant is a PRP" --
25 and I'm sorry, this is on page 10 of his opinion and order --

1 "A defendant is a PRP under Section 9607(a) if it is, (1) the
2 owner or operator of a vessel or facility or (2)" -- and this
3 is the one that Georgia-Pacific relied on -- "a person who at
4 the time of disposal of any hazardous substance owned or
5 operated any facility at which such hazardous substances were
6 disposed of."

7 I would submit to you we did not own and operate the
8 river. We owned and operated a mill. The facility is the
9 mill. It's not the river. The river is the site. But the
10 facility is the mill. Because we can't own and operate the
11 Kalamazoo River. We can only own or operate a facility. Which
12 in this case was the Bryant Mill. And that was the only
13 subject of phase 1.

14 And establishing our liability as to the mill is a
15 threshold issue, of course, for the allocation that's going to
16 occur in phase 2. And that's the issue that was properly
17 designed to --

18 *THE COURT:* CERCLA couldn't have been -- couldn't
19 have cared less, I suppose, about your mill. CERCLA is
20 concerned about the river.

21 *MR. PARKER:* But whether or not we're a PR --

22 *THE COURT:* The facility is just the means by which
23 the river is contaminated.

24 *MR. PARKER:* True, Judge, but in order to determine
25 our allocation, we first have to be determined to be liable.

1 And the liability arises from our operation or ownership of a
2 facility. And that is a threshold issue. And an issue that's
3 actually fairly important for phase 2.

4 I mean, for example, the fact that we were determined
5 not to be an operator of the Bryant Mill during a time it was
6 discharging PCBs from 1954 to 1956. An issue that Judge Jonker
7 spent several pages of his opinion deciding. And we had lots
8 of witnesses at the trial regarding that issue. Certainly will
9 limit our allocation responsibility in the next phase. Had we
10 operated it during that period and had discharged PCBs during
11 that period, presumably our allocation would have been larger.

12 There were big threshold issues as to whether or not
13 during the period of our ownership and operation of the
14 Bryant Mill in phase 1 PCBs were discharged. Judge Jonker
15 found that they weren't, and we were not found to be liable on
16 that basis.

17 Had Georgia-Pacific raised the issue in phase 1
18 regarding these other mills, I would have had the opportunity
19 at that point in time to argue that, hey, we didn't own the
20 mill during the period of time these were discharged. That's a
21 phase 1 issue.

22 Now they are trying to move that around into phase 2
23 after having made a decision for very good reasons, and I'll
24 explain those in a moment. They didn't raise them in phase 1,
25 and now they want to back door them in phase 2, and they

1 certainly shouldn't be allowed to do that.

2 Let me just briefly discuss the three mills, if I can
3 to you, Judge. And I actually brought a different map, which
4 if I can approach I'd like to --

5 *THE COURT:* Well, I think we're talking about the
6 Superfund site; are we not?

7 *MR. PARKER:* Yes, Judge. And I actually have a map
8 of the Superfund site.

9 *THE COURT:* All right.

10 *MR. PARKER:* From the EPA. Can I?

11 *THE COURT:* I would love to see that.

12 *MR. PARKER:* I've handed Your Honor a map of the
13 seven areas of Operable Unit 5. Operable Unit 5 is the
14 Kalamazoo River and the Portage Creek. And as you can see from
15 their nice little seal in the upper right-hand corner, this is
16 from the United States Environmental Protection Agency. And it
17 shows the seven areas of OU-5, the river. And by the way, the
18 OU-1 through 4 are the various landfills that each of the mills
19 have. So, for example, the Bryant -- OU-1 is the Bryant Mill
20 landfill. OU-2 is Georgia-Pacific's landfill. So those are
21 the OU-1 through 4. But OU-5 is the river, and it's broken
22 down by the EPA into seven areas.

23 What you won't see in the Superfund site is
24 Battle Creek, because it's not part of the site. And the two
25 mills, the Angel Street Mill and the Fountain Mill, that are

1 located 25 miles away from Kalamazoo up in Battle Creek are not
2 part of this site. So whether you want to use the phrase
3 "facility" or you want to use the phrase "site," they don't
4 belong here. And trying to bring them in now, when they
5 weren't brought in in phase 1, is certainly inappropriate.

6 The MacSimBar Mill, which as Mr. Sibley showed you is
7 very far downstream, was owned and operated by
8 Mead Corporation. And as I'll explain and as Mr. Sibley
9 conceded, Georgia-Pacific had settled with Mead, so they didn't
10 bring -- name them as a party in this action. And in fact, in
11 the settlement agreement which we've filed as an exhibit to our
12 response brief, Georgia-Pacific agreed to indemnify and defend
13 Mead if it were brought into the case. So they never raised in
14 phase 1 the MacSimBar Mill, the Otsego Mill, because that would
15 necessarily bring them back into the case as Mead's indemnitor.

16 Weyerhaeuser, one of the defendants, tried to add
17 Mead as a third party, and at that time Georgia-Pacific
18 actually served some discovery on International Paper, similar
19 to what we have in front of us now, asking us about ownership
20 of the mill. And at the same time --

21 *THE COURT:* Say that again, please.

22 *MR. PARKER:* Sure. At the time --

23 *THE COURT:* When you say at the time?

24 *MR. PARKER:* At the time that Weyerhaeuser's motion
25 to add Mead as a defendant -- as a third-party defendant was

1 pending in front of Judge Jonker in phase 1, Georgia-Pacific
2 chose to serve some discovery on International Paper asking us
3 about our historic successor ownership related to the Otsego
4 and the MacSimBar Mill. When the judge denied Weyerhaeuser's
5 motion, wouldn't allow them to add it, Georgia-Pacific withdrew
6 that discovery. And they did it because they knew that if they
7 continued to pursue in phase 1 that mill, the judge would say,
8 "Wait a second, I ruled that Mead and this mill is not an issue
9 in phase 1, and you have opposed, you Georgia-Pacific have
10 opposed Weyerhaeuser's attempt to bring them in and assign some
11 liability for that mill to Mead," because that will really put
12 Georgia-Pacific in the soup as the indemnitor. So they
13 withdrew it. Now they are trying to bring in into phase 2 what
14 they made a strategic decision not to do in phase 1.

15 **THE COURT:** Was that before or after your expert
16 argued about the brown box mills and the fact that this
17 material was sent to the brown box mills?

18 **MR. PARKER:** I would argue -- I'd have to think about
19 that a little bit, Judge. I'm not sure when the expert reports
20 came out in relation to when that was argued. I suspect our
21 expert argued that after. But again, I wouldn't want to be
22 quoted on that without having some time to actually look at
23 that.

24 **THE COURT:** If that was the case, perhaps their
25 strategic interests changed again if the brown box mills became

1 the target or the focus of a litigation and they had to point
2 out that, all right, if the brown box mills are going to become
3 the focus of litigation, now we're back interested in the brown
4 box mills that IP may be responsible for, including the
5 MacSimBar Mill.

6 *MR. PARKER:* Well, I guess, Judge, I would say that
7 if that is -- they obviously deposed our expert. You saw the
8 testimony that Mr. Sibley handed out. If that became their
9 theory, then back in phase 1 they should have alerted the Court
10 that that was one of the facilities and activities for which
11 International Paper has CERCLA liability. They never did that.
12 They never said, "Okay, well, then you've got -- we're going to
13 establish liability for the MacSimBar Mill." They didn't do
14 that. Let alone mills that are 25 miles upstream.

15 *THE COURT:* Well, I think their position was, as I
16 understood it, that's not a particularly persuasive argument,
17 but it's one that you are raising and they were going to have
18 to meet. So if they were going to have to meet it, they were
19 going to point out that you had those mills just like they did.
20 So they would have no interest in raising it at the outset but
21 only in defense. And if it hadn't come along at the time that
22 Weyerhaeuser lost its attempt to bring in the Mead mill and
23 they had no other reason to bring in the Mead mill, I can see
24 why they may drop their interest in it until you caused them to
25 have some interest in Mead mill. But perhaps I'm speculating.

1 **MR. PARKER:** Well, again, Judge, I don't know the
2 date of the expert report that Mr. -- or Dr. Woodard gave,
3 but --

4 **THE COURT:** I know. That's why I'm asking.

5 **MR. PARKER:** I will say this, though: The status
6 conference, the initial Rule 16 conference that I quoted their
7 statements from, that wasn't the only time we got in front of
8 Judge Jonker on a status conference. He had another one on
9 June -- I'm sorry, on March 20th, 2012, and the parties filed a
10 Supplemental Joint Status Report at that time which we've
11 attached as Exhibit B to our brief. It's docket 173. And
12 again, the big issue at that status conference was
13 Weyerhaeuser's attempt to add Mead and the Otsego Mill as a
14 party to this matter, which motion GP vehemently opposed. In
15 that Supplemental Joint Status Report GP expressly incorporated
16 its statement of the case from the first one, from the first
17 Joint Status Report where they said they sought to hold
18 International Paper liable for damages attributable to the
19 facilities and activities for which International Paper has
20 CERCLA liability.

21 And I'd just note, Judge, if they meant facilities
22 was the river, it would be singular, not plural. Not multiple
23 rivers here. But they went on -- not only did they expressly
24 incorporate that on page 2 of the Supplemental Joint Status
25 Report, on pages 7 and 8 of the Supplemental Joint Status

1 Report Georgia-Pacific talked about amending the Complaint to
2 add allegations that were being developed in discovery. And
3 International Paper expressed some concern about that,
4 naturally. And on page 8 GP responded, and I quote, "As to
5 IP's stated concern about potential claims against it for mills
6 on the Kalamazoo River other than the Bryant Mill, this issue
7 relates only to the Otsego, Michigan, mill that is the subject
8 of Weyerhaeuser's proposed third-party complaint."

9 So at that point in time, March of 2012, they didn't
10 even mention the Battle Creek mills at that point. They never
11 suggested that we would have any potential liability for that.
12 And instead they said that might only relate to the
13 Otsego Mill. They had outstanding discovery to us on that.
14 And when the judge denied Weyerhaeuser's motion and would not
15 add Mead to this case, they withdrew that discovery. So
16 at least twice they said, "The only mill we'll seek to hold you
17 liable is that for which we seek CERCLA liability in phase 1."

18 And in fact, if you look at the Amended Complaint,
19 the only mill they ever mention in the Amended Complaint is the
20 Bryant Mill. And again, Judge, phase 1 was all about showing
21 that we weren't responsible. I mean, I like to say we were
22 found to be barely an owner of that mill in that decision. We
23 were clearly shown not to be an operator of the mill during any
24 period of time when PCBs were discharged.

25 So I also showed that we're an owner but only by

1 virtue of a lease agreement with Allied which operated the
2 mill, and they were the ones who were then in the act of
3 actually discharging them. All of that will be relevant in
4 phase 2. If in phase 1 I knew these other three mills were
5 going to be at issue, I would have had an opportunity to show
6 that during whatever period of time our predecessors, be it
7 Champion or be it St. Regis -- because IP never operated any of
8 these mills, we just had the bad judgment to buy the companies
9 that once did -- but during our predecessors' ownership period
10 I could have shown we didn't discharge any PCBs. I
11 successfully did that for the big bad Bryant Mill. The mill
12 that supposedly was the dirtiest mill on the street. I showed
13 the judge, and he agreed, that we did not discharge any PCBs
14 during the period of time that we operated it. I could have
15 done that in phase 1. Now they are going to try -- and that's
16 what phase 1 was about. Now they are going to try to back-door
17 it.

18 **THE COURT:** Did you seek to obtain discovery from
19 Georgia-Pacific about the PCBs discharged by the
20 MacSimBar Mill?

21 **MR. PARKER:** Yes, for a reason totally unrelated to
22 their ownership of it or our ownership of it. Mr. Sibley is
23 right that the experts now in phase 2 are creating these mass
24 balance models where they show all of the PCBs, where they are
25 in the river, which mills they came from. And you have to

1 include in that every mill. Even if it's an orphan, you've got
2 to include it, because they are responsible potentially for
3 discharging PCBs, and where they are in the river impacts who's
4 responsible for how much. So clearly evidence of discharging
5 from every mill, even a mill that everybody concedes is an
6 orphan, is highly relevant in phase 2. But the ownership of
7 those mills can only go to the issue of liability. And that's
8 why we answered the discovery as it related to operation but
9 objected to it in connection with GP's attempt to show in
10 phase 2 that we're somehow liable for a mill it didn't show we
11 were liable for in phase 1. Because they don't need to know
12 who owned the mill in order to show what output from the mill
13 there was. So that's where we draw the line.

14 *THE COURT:* If the output is relevant, why wouldn't
15 the ownership be relevant?

16 *MR. PARKER:* The ownership is not relevant in this
17 phase for anybody who is not a party. I mean, because in
18 phase 1 they didn't show that we had liability for that mill.
19 Now they are trying to say, "Okay, but you are liable for it
20 because you owned it and because it discharged." That's what
21 we did in phase 1. That's how Judge Jonker set this up.

22 *THE COURT:* Let's assume for the moment that all of
23 these mills on the river were owned by IP. Wouldn't that be
24 relevant to allocation if they -- you look up and you figure
25 out each discharged such and such and that gives you the

1 discharge from all of these mills and it turns out that IP
2 owned every single one of them. Wouldn't that be relevant as
3 to allocation?

4 *MR. PARKER:* Only if the mill that IP owned actually
5 discharged PCBs. If we owned a mill on the river that didn't
6 discharge PCBs, it's not relevant to this -- to any phase of
7 the case, 1 or 2. And what phase 1 was about was figuring out
8 which of those mills are we -- did discharge.

9 *THE COURT:* My hypothetical -- perhaps extreme, but
10 nevertheless -- you figure out which mills discharged what, and
11 that's what your discovery went to. And so MacSimBar Mill
12 discharged a certain percentage, and the rest of them all
13 discharged different percentages, but it turns out that IP
14 owned every single mill. If that was the case, wouldn't that
15 be relevant to the allocation of equitable allocation of
16 liability?

17 *MR. PARKER:* If I understand your hypothetical,
18 Judge, it is that IP owned all the mills and all the mills
19 discharged.

20 *THE COURT:* Well, some did, some didn't. If you
21 owned them all, wouldn't you be a hundred percent responsible?

22 *MR. PARKER:* Well, if we owned them a hundred percent
23 of the time as well? In other words --

24 *THE COURT:* Obviously.

25 *MR. PARKER:* Okay. Yes. Because by the way, these

1 mills were owned by various people at different times. This
2 MacSimBar Mill --

3 *THE COURT:* They can factor a hypothetical that
4 covers that.

5 *MR. PARKER:* Fair enough. Okay. If we owned them
6 all all of the time, I suspect there wouldn't be any lawsuit
7 because it would just be us and EPA. But the fact that there
8 are multiple parties is what makes the ownership in phase 1 and
9 the operation and liability relevant. So I think what your
10 hypothetical, which as you conceded was extreme, it takes that
11 issue right out of it. But once you have multiple people and
12 multiple mills, then necessarily the way Judge Jonker set this
13 up was to say in phase 1 we'll figure out which facilities have
14 CERCLA liability and then in phase 2 we'll allocate
15 responsibility based upon what we determine in phase 1.

16 *THE COURT:* What's the judge going to do with this
17 information that says the MacSimBar Mill discharged let's say
18 20 percent of the PCBs into the river if he doesn't know who
19 owns it? He's going to say, well, so that means Bryant with
20 80 percent of the responsibility, so we're going to reduce your
21 liability to only 80 percent of the . . .

22 *MR. PARKER:* I think he'd decide they are an orphan.
23 And let me answer your question this way, Judge. Assume for a
24 minute in phase 1 where I opposed ownership and operation, I
25 won on ownership, I lost -- I mean, I lost on ownership, I won

1 on operation. Assume I would have won on ownership, okay? Now
2 I'm out of the case, right? Could they have tried to bring me
3 back in in phase 2 based upon three other mills they didn't
4 argue in phase 1? Of course not. Because they made a choice
5 in phase 1. They said, "This is the mill we're going to try to
6 pin your liability on." And clearly, if I would have succeeded
7 on my ownership issue -- which I think I barely lost -- but if
8 I would have succeeded on that issue, Judge, I would be in
9 Cleveland today. I wouldn't be here. By the way, I love
10 coming to Grand Rapids because it's like Cleveland. But if --

11 *THE COURT:* You may get to go to Cincinnati instead.
12 Another fine city in the state of Ohio.

13 *MR. PARKER:* Yes. And no offense to the
14 Sixth Circuit, but I prefer Grand Rapids and Cleveland to
15 Cincinnati.

16 But that's one way to think about this, Judge. If I
17 would have won on the Bryant Mill in phase 1, there is no
18 argument today about this, right? And that's why they had to
19 raise these things in phase 1. They took a calculated risk for
20 a lot of reasons, and now they can't back away from that. They
21 can't say, "Well, you know what, Judge Jonker is not going to
22 let Mead in this case, now it's okay for us to try to back-door
23 some liability" --

24 *THE COURT:* Well, it's not unusual once you establish
25 liability to go beyond the narrow facts of liability when

1 you're looking at damages.

2 **MR. PARKER:** Well, but it's not just damages. It's
3 allocation. And what we set up in phase 1, by their own
4 admission is --

5 **THE COURT:** Isn't it a broad -- I mean, look at all
6 the cases that your opponent cited that says how broad the
7 discretion of the court is in determining equitable allocation.
8 The court can look at a variety of things that had nothing to
9 do with the actual determination of liability.

10 **MR. PARKER:** That's clearly true, Your Honor. But I
11 would challenge Georgia-Pacific to give the Court a case where
12 you were found liable for -- because a lot of these CERCLA
13 cases are done in phases -- but where you're found liable for a
14 facility in phase 1 and somehow in phase 2 you get equitable
15 allocation for other facilities that weren't the subject of
16 phase 1. None of their cases stand for that proposition. They
17 say you can look at intent, you can look at how evil the person
18 was, all of these kinds of things, but they don't say "We
19 established liability for one facility in phase 1 and then in
20 phase 2 we're going to go out and show you have a greater share
21 of the overall allocation for facilities we never showed you to
22 be CERCLA-liable for." None of their cases stand for that
23 proposition, and we couldn't find one that did.

24 **THE COURT:** But can the Court ignore, can the Court
25 ignore other ownership interests that IP may have that

1 contributed to this Superfund site pollution?

2 **MR. PARKER:** I would submit yes, and I would submit
3 that's exactly what Judge Jonker did when he said Mead is not
4 coming into the case. It's too late.

5 You know, at the first status conference one of the
6 things -- NCR wanted to actually subdivide phase 1 into two
7 subphases. And the judge said, "You know what, we've got
8 really old witnesses in this case. People" -- it's in the
9 transcript -- he said, "They are literally dying on us because
10 this stuff goes back to the '50s. I don't want to wait that
11 long. I want this decided now."

12 Well, wouldn't you think, then, that if there were
13 other mills that International Paper should somehow be liable
14 for, those should have been addressed in phase 1? I mean, I've
15 got the prejudice now I've got to go out and find all those
16 people, redo phase 1 as to three mills to figure out whether or
17 not there was recycling going on during the periods of
18 ownership. All of those kinds of things. When Judge Jonker
19 said, "Man, we need to do this now because these are old
20 people." And now suddenly I've got to try this in phase 2 when
21 I may not have those witnesses available to me anymore? I
22 mean, I haven't even had a chance to look. And that's the
23 other thing. We've got a discovery schedule. Discovery is
24 over in two months. We've got a year to do this discovery in
25 phase 1 -- actually more than a year -- on whether or not there

1 was CERCLA liability for the Bryant Mill. Now I've got less
2 than two months to determine whether -- to do all the discovery
3 I'm going to need to do to try to show in phase 2 whether or
4 not there's CERCLA liability for those mills?

5 And, Judge, I think I've got a really good shot of
6 showing that. You remember from the last time we were here
7 there was this KRSG, the Kalamazoo River Study Group, which
8 consisted of Georgia-Pacific, the Allied Corporation which
9 operated the Bryant Mill and bought it from us in 1966. They
10 owned and operated the King Mill. They owned and operated the
11 Monarch Mill. And at various times before companies went
12 bankrupt there were other members of the KRSG. They brought a
13 lawsuit in this court trying to hold, for example, Eaton liable
14 for PCBs that were discharged upstream of Morrow Lake. Came
15 down, somehow flowed over the dam and came into the site, the
16 Superfund site.

17 In that case Judge Bell ruled -- and this is at
18 258 F. Supp. 2d 736 is the case, and this page that I'm going
19 to cite from is at 757. Back in 2002 Judge Bell held that
20 Aroclor 1254 and 1260 made up 90 percent of the PCBs in
21 Morrow Lake.

22 Now, Mr. Sibley's chemistry lesson, which I'm glad he
23 had to give and not me, is that the PCBs that come from
24 carbonless copy paper, those are 1242. Judge Bell ruled
25 90 percent of the PCBs in Morrow Lake are 1254 and 1260. Right

1 on page 757 of that case. So at most 10 percent is Aroclor
2 1242. That's assuming -- and there's a whole bunch of
3 different Aroclors. There's more than three. So if 90 percent
4 are 1254 and 1260, the most that could have come from the
5 carbonless copy paper, the 1242, would have been 10 percent.

6 He held that the total PCBs, 90 percent of which were
7 not my PCBs or any paper company's PCBs, were not a significant
8 contributor to the PCBs in the Superfund site. That was the
9 holding of his case. So if 90 percent of the PCBs in the
10 Morrow Lake were not a significant contributor to PCBs in the
11 Superfund site, how could that little 10 percent, some subset
12 of which is the Aroclor 1242 that might have come from the
13 Angel Mill and the Fountain Mill 25 miles up in Battle Creek.
14 Those are all things in phase 1 I could have shown. Now, with
15 less than two months left in discovery I've got to try to
16 garner all those facts and do a mini phase 1 trial inside the
17 phase 2 trial, or file a motion in limine as Mr. Sibley
18 suggested, to say that was -- that was for last February when
19 we had the trial in phase 1.

20 So there are really good grounds for me to show that
21 these mills didn't contribute anything to this Superfund site.

22 I mean, Mr. Sibley has told you he doubts the theory,
23 yet we're going to get this trial in phase 2. The prejudice to
24 us would be really, really great from that. And my experience
25 with Judge Jonker is he doesn't like to move his deadlines, but

1 I'm going to be forced to ask him to if I suddenly have to try
2 three phase 1 trials inside the context of phase 2.

3 Every -- the other thing, Judge, it not only --

4 *THE COURT:* Didn't your chemical results show a
5 marked change downriver from the MacSimBar Mill?

6 *MR. PARKER:* Well, it's the farthest downstream,
7 Judge, so presumably all of the mills that were upstream of
8 it -- you know, you can't -- unfortunately nobody can
9 fingerprint the 1242. You can't tell if the 1242 came from
10 Georgia-Pacific's --

11 *THE COURT:* No, I understand that. But you said that
12 the box -- the brown box has a different chemical fingerprint
13 than the copy paper.

14 *MR. PARKER:* I don't think that's right. I don't
15 think that's what Mr. Sibley said. They make different kinds
16 of paper, obviously, and the processes for making a fine white
17 paper obviously are different than for making cardboard.

18 *THE COURT:* Is the cardboard that's made -- MacSimBar
19 Mill, does that make --

20 *MR. PARKER:* Cardboard.

21 *THE COURT:* -- exclusively brown box?

22 *MR. PARKER:* Cardboard is my understanding.

23 *THE COURT:* Cardboard?

24 *MR. PARKER:* That's my understanding.

25 *THE COURT:* All right. Does that leave a different

1 fingerprint?

2 **MR. PARKER:** No. No. When we're looking at the
3 PCBs, they are all 1242.

4 **THE COURT:** All right.

5 **MR. PARKER:** Because it's not -- the problem is when
6 we recycle NCR's paper, it had the 1242 Aroclor in it, the PCB,
7 and so whether you were making the fine white paper using that
8 or the box paper or whatever, it got put in. And unfortunately
9 we can't -- when we dig in the river and they do these core
10 samples, it's my understanding -- and Mr. Sibley can correct me
11 if I'm wrong -- you can't tell whether it came from a boxboard
12 mill or a fine paper mill by looking at the Aroclor.

13 Now, I'm sure the experts are going to opine, well,
14 where its location in the river vis-a-vis a particular mill
15 might somehow give you some insight. If it's right outside
16 your discharge pipe, it's probably more likely from that mill
17 than somebody else. But as to looking at the molecules, it's
18 my understanding you can't tell where they came from.

19 **THE COURT:** All right.

20 **MR. PARKER:** But I think that's relevant for the
21 mills up in Battle Creek, because, you know, they have got to
22 flow 25 miles, go up over a dam, and as Judge Bell --

23 **THE COURT:** So water does go over the dam?

24 **MR. PARKER:** Clearly. Clearly it goes over the dam.
25 But not --

1 **THE COURT:** So these can migrate?

2 **MR. PARKER:** They can. But it's not as significant,
3 as Judge Bell held against KRS, Kalamazoo River Study Group, of
4 which Georgia-Pacific was a member -- International Paper was
5 not -- I should point out, you know, one of the reasons -- you
6 had asked why didn't the parties try to bring Mead in sooner.
7 Weyerhaeuser was the party that tried in bring in Mead. We did
8 not.

9 **THE COURT:** Right.

10 **MR. PARKER:** We are the newcomer to this site.
11 Allied Paper Company was the big behemoth on this river because
12 they owned three mills: The King Mill, the Monarch Mill, and
13 the Bryant Mill. The only mill which St. Regis, IP's
14 predecessor twice removed, owned for a period of time, up
15 through 1966, was the Bryant Mill. And so -- and we only
16 operated it -- we owned it for a 10-year period during this
17 lease. And it is during that period that -- while Allied was
18 operating and the PCBs were discharged. And Allied was always
19 the party -- was a member of the KRSG, was out dealing with the
20 EPA until its bankruptcy. After its bankruptcy in 2009, then
21 EPA did some searching, Georgia-Pacific did some searching and
22 said, "Hey, way back then, back in 1956, they owned and
23 operated this mill. Let's see if we can bring them to the
24 party." So we're literally scrambling in phase 1 when they
25 bring this suit to figure out all the facts.

1 We're worried -- we don't have any operational
2 records for our own mill because we sold it in 1966 and we
3 turned over operation of it in '56. Our mill being the
4 Bryant Mill. Let alone, Judge, try to figure out who everybody
5 else is on the river, owned and operated and all those kinds of
6 things. So it was everything we could do to get ready for that
7 phase of the trial, let alone bring in other parties.

8 Georgia-Pacific, on the other hand, has been on this
9 river since at least the 1990s. And active -- as we saw last
10 time -- the mediation summary that you ordered produced was
11 from 2001. They have known about who was on the river and all
12 those kinds of things. I mean, they settled with Mead in 2002.
13 So they have known all these things and had reason to bring in
14 people. We just -- we're just the new kids on the block, and
15 that's why we did not seek to bring in Mead.

16 Obviously, if the Otsego Mill had been the subject of
17 phase 1, we certainly would have tried to bring in Mead which
18 co-owned in the sense -- not at the same time -- but owned --
19 also had common ownership of that mill during part of the
20 period.

21 Judge, just to summarize --

22 *THE COURT:* Uh-huh.

23 *MR. PARKER:* -- Judge Jonker set up this case so that
24 we would have a phase 1 where we would determine CERCLA
25 liability for facilities. As Georgia-Pacific represented to

1 the Court, they would only seek allocation as to those
2 facilities and activities -- activities referring to
3 arrangement for disposal, NCR -- but to those facilities for
4 which they could establish CERCLA liability. They did that for
5 the Bryant Mill. They chose not to do that for any other mill.
6 And, therefore, they shouldn't be able to do in phase 2 what
7 they specifically agreed they wouldn't do or didn't seek to do
8 in phase 1. And that's why, given the great prejudice that
9 would result to International Paper, by bringing in these three
10 mills this late in this case, we oppose this motion. Thank
11 you.

12 *THE COURT:* Thank you.

13 *MR. SIBLEY:* May I briefly, Your Honor?

14 *THE COURT:* Yes.

15 *MR. SIBLEY:* I want to address a question you posed
16 to Mr. Parker at the outset of his argument. Specifically
17 whether liability -- what you're apportioning -- what is it
18 that you're apportioning in phase 2? Actually "apportion" is
19 the wrong word. What are you allocating in phase 2 on an
20 equitable basis?

21 Mr. Parker answered that it all comes back to
22 liability and the ownership of specific mills. And I would
23 respectfully submit that that's not the correct inquiry. What
24 we're allocating in phase 2 is equitable responsibility for
25 costs that have been incurred and that will be incurred.

1 You're talking about cleaning up the actual river. That's what
2 the costs are. Your liability is only your ticket to the
3 dance. It's your Charlie with the golden ticket to go see
4 Willy Wonka, right? That's what we figured out in phase 2:
5 Who has the golden tickets? And there's three of them who do.
6 And so they are there. They are out there. We're at the
7 chocolate factory now and we're trying to figure out who pays
8 for what in the cleanup.

9 The construct that International Paper has erected
10 here is that all liability -- anything having anything to do
11 with liability is resolved, if at all, in phase 1, we put all
12 of that aside and then we look at other stuff in phase 2. And
13 that's simply not correct. Judge Jonker's own order
14 acknowledges that that's not right. He didn't need to reach,
15 for example, the Panelyte facility, because he had already
16 determined that IP was in fact an owner. They have their
17 ticket, right? They are coming. They are going to pay a part
18 of this. And that's why this notion that we are trying to pin
19 liability on IP in phase 2 is simply incorrect. They're
20 already liable.

21 The Bryant Mill, all of the stuff that the
22 Bryant Mill discharged into the river that flows down
23 Portage Creek, if you look at the map -- Mr. Parker noted that
24 flows all the way down Portage Creek. It goes into these
25 downstream areas all the way down into Lake Allegan and indeed

1 all the way down into Lake Michigan. They are jointly and
2 severally liable for that. The question is whether as an
3 equitable matter I can -- how big a share I can pin on them.
4 And again, I'm always quick to note that's the share -- the
5 non-NCR share we're talking about. They can be made to clean
6 up everything.

7 What they are going to argue is that, you know, in
8 these areas downstream of Otsego, they'll say, "Look, that's
9 Otsego Mill stuff. That's not my stuff." And what we would
10 want to say to Judge Jonker is, "You know what, Judge, it
11 doesn't matter. That argument, you shouldn't give that any
12 weight, because they owned that mill until 1968."

13 Moreover, Mr. Parker noted that the issue of
14 ownership can only relate -- can only go to the question of
15 liability. I think that's what he said.

16 The same can be said for discharge. They acknowledge
17 that they were an owner of the Bryant Mill, owner and operator
18 from 1954 to 1956. They won on that question because we didn't
19 have sufficient documentary evidence showing that they received
20 carbonless during those years. Now, that question which was
21 litigated in phase 1 is the same question that they want to
22 litigate as to these other mills in phase 2. They already have
23 gone down that road.

24 This mass balance analysis he talks about, they are
25 going to look at what this MacSimBar Mill did, what these

1 Battle Creek mills did and decide whether they contributed to
2 the PCBs in the river. And if the testimony of Dr. Woodard is
3 any indication, they are going to try and put that on board
4 mills. In fact, if Mr. Parker and everyone else would be
5 willing to stipulate that board mills were not major
6 contributors of PCBs in rivers right now, perhaps this issue
7 goes away. I don't think they are going to do that. We
8 certainly have the right to defend ourselves and note that if
9 that's correct that they bear a responsibility as well.

10 Let me talk a little bit about the timing very
11 quickly. The discovery -- fact discovery cutoff was in March
12 of 2012. It is around that time that Judge Jonker ruled that
13 Mead cannot be brought into the case.

14 Dr. Woodard, he did not articulate in his expert
15 report that board mills would have received -- at least my
16 recollection is that he didn't articulate that in his expert
17 report. The first time that came up -- and I'm going off of
18 recollection, Your Honor. Mr. Parker I'm sure will correct me
19 if his report does mention that. But the first time I recall
20 it coming up was when we took his deposition in July of 2012.
21 And so it had been -- we were four months after the discovery
22 cutoff, we were well into expert discovery, and we were months
23 away from trial at that point. This was a late-arising theory.
24 And one that really could only go to become relevant in
25 phase 2. It was really a preview of what we expected to have

1 to deal with at that point. At that point Judge Jonker had
2 already made his decision that Mead would not be brought into
3 the case, and we had made our decision not to pursue liability,
4 a liability finding as to the Otsego Mill.

5 And again, that finding is superfluous to what we
6 got. We got the bigger, the bigger and better liability
7 finding, the one related to the Bryant Mill, that would make IP
8 responsible for cleaning up all stretches of the river,
9 including stretches well upstream of Otsego.

10 So that's the --

11 *THE COURT:* Can you say the last part again?

12 *MR. SIBLEY:* The liability of the Bryant Mill
13 makes -- IP's liability for ownership of the Bryant Mill makes
14 it jointly and severally liable for the cleanup at the site.

15 Now, IP might argue it made some sort of divisibility
16 argument based on geography, right? If they just owned the
17 Otsego Mill, if that was the only thing we pursued, they might
18 say, "You know what, these costs, Georgia-Pacific, that you've
19 incurred upstream to clean up the Plainwell impoundment," to
20 use one example, "we don't have to pay for that because that
21 couldn't be our stuff. The stuff flows downriver." Right? So
22 we picked the furthest upriver IP facility we could and that's
23 what we focused on. It's also the biggest and dirtiest and the
24 one that we think gives us the most bang for the buck.

25 I'd like to also note, finally, that toward the end

1 of the argument Mr. Parker said that IP is the new kid on the
2 block and they are just coming to this and that's been the tune
3 for a long time. It's not true. They were served with these
4 104(e) requests back in 2003. They have known that they are
5 involved in the sites for that long. It's simply incorrect to
6 say that this comes out of the blue that they may be
7 responsible for having to clean up -- be made responsible for
8 contributions from these other boxboard mills.

9 Moreover, Mr. Parker also said that we're now
10 two months from the end of fact discovery. That's true, but we
11 served these requests in April of this year. That was three
12 months ago. So they have had plenty of time.

13 And even that, Your Honor, is not -- only goes so
14 far. Mr. Parker has already acknowledged that they are going
15 to be doing mass balance analyses that look at the contribution
16 and discharges from all of these mills. So it's simply
17 incorrect to say that this expands discovery in some meaningful
18 way. The only thing it would do is put a blind spot, put a big
19 redacted stamp over the question of who owned the mill, the
20 MacSimBar Mill, before 1968, and certainly with respect to the
21 Battle Creek mills.

22 Your Honor, I think the discovery is relevant, it's
23 clearly a factor that Judge Jonker can consider, and we'd ask
24 again that the motion be granted. Thank you.

25 ~~THE COURT:~~ Thank you, Counsel.

1 **MR. PARKER:** Judge, could I raise one point I forgot?

2 **THE COURT:** Sure.

3 **MR. PARKER:** Thank you. And Mr. Sibley reminded me
4 of it. The Panelyte mill he mentioned was something
5 Judge Jonker deferred deciding in phase 1. If I can use the
6 whiteboard at the risk of showing off my lack of artistic
7 talent.

8 The Bryant Mill site which was located along
9 Portage Creek and an A mill right here, which was the
10 Bryant Mill Pond when they damned the mill -- or the creek, it
11 may not have been a pond -- the Panelyte mill was right here.
12 Here, this was Alcott Street. Up here were the B, C, D, and at
13 one time E mills. All of this being the Bryant Mill. Monarch
14 was over here. And the river flowed this way. They had the
15 alternative ownership theory. They said, look, you own -- this
16 was the big bad deinking mill that discharged into the pond
17 that flowed up eventually to the confluence of the Kalamazoo.
18 This Panelyte mill, which admittedly did not process PCBs, had
19 common piping from the A mill and other mills up here because
20 at one time St. Regis owned all this. When we sold -- well,
21 first we leased it, and we leased everything but Panelyte to
22 them. And then when we sold it in 1966 we kept Panelyte. It
23 made plastics. Refrigerator inserts in the '50s and '60s.
24 That kind of papery-looking plastic I understand that they had
25 that back in those days.

1 Their alternative ownership theory was, "Well, if you
2 could get out of this under your security exemption defense
3 that you were raising, this lease, you still kept the Panelyte,
4 and because you shared piping and everything in common with the
5 pond, we can get you CERCLA liability on that."

6 The judge said, "Well, look, Parker, you lose on
7 that. You lose the security interest defense. So there is
8 ownership here. I don't need to decide, therefore, whether
9 this Panelyte mill that wasn't even discharging PCBs somehow
10 gets you in under an ownership theory."

11 That is quite different, I would submit, than
12 deciding whether 25 miles to the east in Battle Creek, or
13 40 miles whatever it is down to Otsego, those mills are somehow
14 part of this. For their theory on this deferral, you've only
15 got to get in the door on CERCLA liability and then it's all
16 over, why would the judge spend five pages in his opinion
17 concluding that St. Regis was not an operator if I can walk in
18 the door of CERCLA liability by virtue of this ownership which
19 he did find, I lost on that argument, why did he spend all his
20 time talking about this for in the opinion? Because it's not
21 just a door you walk in. The basis of, one, establishing
22 liability and the basis for liability are all going to be
23 relevant to phase 2, and he wanted us to do those issues in
24 phase 1. And now what they are saying is, "Let's do phase 1 as
25 to these mills." It's too late. They made a decision,

1 Georgia-Pacific made a decision not to include those, for
2 whatever reason. Some of which I've tried to articulate, other
3 ones I'm not really sure other than they -- I think they agree
4 with Judge Bell it's a waste of time to include these mills in
5 Battle Creek. But they chose not to do it. And they can't
6 back-door it in phase 2, because that's not what Judge Jonker
7 set up as the way we were going to try this case. Thank you
8 for indulging me. And my artwork in particular.

9 *THE COURT:* Well, I certainly think I did indulge you
10 with the artwork.

11 *MR. PARKER:* Yeah, I think that's pretty apparent,
12 Judge.

13 *MR. SIBLEY:* May I just very quickly, Your Honor?

14 *THE COURT:* Sure.

15 *MR. SIBLEY:* I just want to -- Mr. Parker was
16 reluctant to acknowledge that even using his map the Panelyte
17 property comes into the fold. It's over the pond. The pond is
18 where they disposed of the PCBs. That gets you in the door
19 under CERCLA. I just wanted to make sure that's clear.

20 Also let me point out one factor. It's why ownership
21 interest is important. Mr. Parker has articulated, perhaps
22 better than I could ever hope to, why board mills did not use
23 carbonless paper and why his theory doesn't work.

24 The Fountain Street and Angel Street mills, if they
25 were big dischargers of PCBs, really irrespective of whether

1 they used carbonless as Dr. Woodard says, you'd see it in
2 Morrow Lake. I bet if we actually got some discovery from them
3 on this, we might see some -- from the mid-'70s, we might see
4 some documents authored by people at what was historically
5 known as -- the Michigan Carton Company owned both of these
6 mills -- rolls up to IP saying, you know, we're not a big
7 discharger -- given our processes, we would not have discharged
8 very much, if any, of the PCBs, right? If IP is the owner,
9 that's an admission. That's a party admission that I can use
10 to impeach any witness that attempts to articulate the theory
11 that Dr. Woodard articulated.

12 He notes the distances. Twenty-five miles to the
13 east of -- that Battle Creek is 25 miles to the east of
14 Morrow Dam. If you look at his map, Your Honor -- and I'll
15 tell you that a tremendous amount, as much as 50 percent of the
16 total mass of PCBs in the Superfund site are in Lake Allegan.
17 Lake Allegan is 40 miles downstream from the Sutherland Mill,
18 which is my boxboard mill, my brown boxboard mill. Okay?
19 What's the one thing -- if my mill was discharging that, right,
20 why do we see so many PCBs here but not in Morrow Lake? Well,
21 the reason is because it's not coming from the board mills,
22 right? It's coming from the deinking mills. Anyway, it's that
23 type of impeachment evidence, Your Honor, that I would love to
24 be able to put on and I need to establish and get discovery and
25 acknowledging their ownership interest in order to do it. And

1 I think it's squarely within the scope of what's allowed under
2 the cases, and again we'd ask that you grant our motion. Thank
3 you.

4 *THE COURT:* Excellent arguments by both attorneys, no
5 question about that.

6 I'm privileged to have a young intern from Notre Dame
7 Law School assisting me this morning who certainly will benefit
8 from hearing very, very fine argument from both counsel. She's
9 had a chance to study these briefs over the past week as well.
10 But she will not have a chance to help me draft an opinion
11 because I'm going to render it from the bench.

12 Before the Court is the issue of whether or not the
13 defendant should be compelled to respond to requests to admit,
14 and they have raised objections to a number of these requests.
15 The objections are all the same. We haven't discussed these
16 individual requests as we would normally do since it's the same
17 objection to all of them. And it's not an issue of the
18 sufficiency of the answer. The issue before the Court is
19 whether or not the defendant ought to be required to respond to
20 the request or not. If the objection is well taken, then they
21 don't need to be responded to. If it is not well taken, then
22 the Court will direct that the defendant file a response to the
23 request to admit and they can go ahead and file their response.

24 I appreciate the maps that have been furnished,
25 because as I read through these briefs, it became more and more

1 evident that one needs to understand the facts to make at least
2 an intelligent run at this issue. That's why I had the
3 whiteboard brought in. Because I had thought the parties were
4 assuming the Court understood all of this, and that would be a
5 risky assumption. But the parties made the correct assumption,
6 that is that they knew a lot more about this than the Court
7 did, and wisely chose to bring in maps that illustrated their
8 respective positions, and that was of great assistance.

9 Counsel for IP began by stating that the issue for
10 the Court is to decide in effect the scope of the liability.
11 That is the -- and I may not be phrasing that exactly as
12 counsel did -- but essentially they put before the Court the
13 issue that is for Judge Jonker in phase 2 of this lawsuit. I
14 don't take that as the issue before the Court today. I think
15 the issue before the Court today is more limited and it's one
16 of discovery. Which may portend which way I'm going to rule on
17 this issue.

18 Here the Court is guided by Rule 26, and I think that
19 the request to admit ought to be answered. They simply ask
20 ownership questions, and it will tell the parties and the Court
21 who owns these mills that are at issue. Because everything
22 else won't make much sense if the parties aren't even able to
23 argue to the Court who owns the mills going forward.

24 Now, it's understood that these mills are going to be
25 examined to determine what they produced or how much

1 contamination they produced. Certainly to do that in a vacuum
2 without knowing which mills were owned by which parties won't
3 be of great assistance to the Court. And certainly IP can make
4 its arguments that it has so ably made today to Judge Jonker at
5 the appropriate time that the Court should not or need not or
6 cannot consider that mills owned by IP other than Bryant should
7 be taken into consideration in allocating responsibility.
8 Whether or not they prevail on that I'm not sure. Certainly
9 CERCLA offers wide relief. It was after all passed by the same
10 body, that is Congress, that tells us in a different arena, in
11 the criminal arena, that if a defendant is convicted of one
12 crime among others that he's charged with by say a plea of
13 guilty, the Court can consider a wide variety of factors for
14 which he has not pled guilty but has only been charged with in
15 sentencing him. Or where a defendant has been convicted in a
16 conspiracy and has been shown to have participated in a small
17 portion of that conspiracy can nevertheless be held responsible
18 for the entire product of that conspiracy when it comes to
19 sentencing. Congress had no difficulty with those concepts.

20 And here where we have a remedial situation as far as
21 the Superfund site is concerned and strict liability is imposed
22 on someone who has contaminated a Superfund site, a particular
23 mill which is only the means of the contamination, I don't
24 think Congress really cared about the means of the
25 contamination but rather looked to the end result, the cleanup

1 of the Superfund site. Once you're held responsible, I suspect
2 there's a strong argument that says if you're in, you're in all
3 the way and everything is in play. So you have a ticket to the
4 dance, as Georgia-Pacific would argue. Perhaps that was the
5 allusion to Willy Wonka. Frankly, I never saw the movie, so I
6 can't say.

7 But coming back, the relevance under Rule 26 is
8 construed broadly to encompass any matter that bears on or
9 reasonably could lead to any matter that bears on any claim or
10 defense, and here what it bears on is very broad under CERCLA.
11 So you have a broad rule of discovery or of matters that could
12 lead to relevant discovery or relevant matters in court on a
13 very broad statute and a very broad remedy. You put those one
14 on top of the other and I think it fully encompasses what the
15 plaintiff is seeking here.

16 And then we have the orphans, the possible orphans
17 out here, and if we have mills that are orphans, perhaps they
18 ought to be -- their allocation ought to be divided up equally
19 among all parties, but if they are not really orphans, then
20 their responsibility ought to be attributed to one party or the
21 other, that makes a difference. So that provides some argument
22 that ownership is important.

23 International Paper has, of course, made its own
24 inquiries through discovery and are specific as to both the
25 MacSimBar Mill and Hawthorne having to do with the output of

1 those mills. I understand why, but again that comes back to
2 the fact that if we're looking at the amount of contamination
3 from these mills, ownership of these mills may be of interest
4 to the Court in allocating responsibility. I suspect
5 Judge Jonker will prefer not to make these determinations in a
6 vacuum. Or if he decides in favor of International Paper,
7 at least he'll know what it is he is not going to be
8 considering when he decides not to consider it.

9 The Motion to Compel International Paper to provide
10 the answers to the requests to admit is granted.
11 International Paper will provide responses to the requests to
12 admit within the next 10 days.

13 I assume you can do that within the next 10 days.

14 **MR. PARKER:** Yes, thank you, Judge, we can.

15 **THE COURT:** All right. Anything further?

16 **MR. PARKER:** No, thank you, Judge.

17 **THE COURT:** Thank you gentlemen.

18 **MR. SIBLEY:** Thank you, Your Honor.

19 **THE COURT:** We'll have a brief recess until our 11:30
20 matter is in place. Thank you.

21 *(Proceeding concluded at 11:39 a.m.)*

22 * * * * *

23 CERTIFICATE

24 I certify that the foregoing is a transcript from the
25 Liberty Court Recording System digital recording of the

1 proceedings in the above-entitled matter, transcribed to the
2 best of my ability.

3

4 July 21, 2014

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6 /s/ Glenda Trexler
7 Glenda Trexler, CSR-1436

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